DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

CHM, Inc. ("CHM") and CelSMeR [1], by their attorneys and pursuant to Section 1.115 of the Commission's Rules offer their Reply to the Opposition to Petitions for Review ("Opposition") filed by Pittencrieff Communications, Inc. ("PCI") on December 15, 1995.

I. The Decisional Documents and the Regulation as Finally Adopted Were Unambiguous in Requiring MTA Licensees to Meet A Three-Year/One-Third Construction Benchmark.

PCI argues that Section 90.665(c) as adopted by the Commission in its Second Order on Reconsideration and Seventh Report and Order, FCC 95-395, released September 14, 1995 ("Second Recon Order") was "...silent as to the ability of the licensee to submit a [substantial service] showing at the end of three years." Opposition at 4. PCI claims the Second Erratum merely "clarified the ability of licensees to take advantage of the 'substantial

[1] In the Application for Review jointly filed by these two parties on December 8, 1995, CHM was mistakenly referred to as "CMH". Also, per Public Notice, DA 96-2, released January 11, 1996, extending filing deadlines, this Reply is timely filed.

coverage alternative at the three year coverage benchmark." Id. [2] PCI's mischaracterization of the clear language of the Second Recon Order is but a self-serving attempt to devise a regulatory groundwork to justify frequency hoarding.

The plain language of the decisional documents and the unambiguous language of the final rule clearly define an absolute three-year/one-third construction benchmark. As early as the Second Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 6884, 77 RR2d 960 (1995) ("Second R&O and Second NPRM") in this proceeding, the Commission stated

> We will require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years. Alternatively, at the five year mark, MTA licensees may submit a showing to the Commission demonstrating that they are providing substantial service.

(Emphasis added.) Second R&O and Second NPRM at 969. There is no mention of any "option" or "alternative" to the three-year/one-third construction benchmark. The "substantial service" alternative was specifically attached only to the five-year benchmark. If, as PCI claims, the Second R&O and Second NPRM was "inartful" in not specifying an alternative to the three-year/one-

---

[2] PCI's initial participation at this late date is entirely suspect. PCI admits that it has not previously participated in this proceeding. Section 1.115(a) of the Rules requires that a person who did not participate in the earlier stages of a proceeding may participate in later stages only upon a showing that it was not possible for that person to participate previously. PCI made absolutely no attempt to make such a showing, and its Opposition thus should not be considered by the Commission. However, to allow for a complete record, CelSMeR and CHM address herein the issues raised in PCI's Opposition.

third benchmark, the Commission had two further opportunities to clarify its intent. In the face of petitions for reconsideration specifically addressing the coverage/benchmark issue, the Commission did not alter the language of Section 90.665(c).[3] The Second Erratum did not clarify anything, it created without notice and comment, a three-year/substantial service benchmark option. That option represents a substantial change in the existing rules and a totally reversal of policy.

II. The Public Benefit of Policies to Prevent Spectrum Warehousing Outweigh the Limited Benefit of Encouraging Warehousers to Bid at Auction to Increase Auction Revenues.

PCI claims that "a strict requirement that licensees must show coverage to one-third of the population after three years, with no alternative to demonstrate that they either are or will provide 'substantial service' eliminates the benefits of the 'substantial service' alternative." Opposition at 6. The only class of persons that "benefit" from the new rule proposed in the Second Erratum are persons interested in warehousing spectrum.

Congress directed the Commission to use auctions to both prevent warehousing and ensure rapid deployment of new technology.[4] The Commission therefore has a continuing duty to prevent warehousing at all times. Contrary to PCI's bald assertion, the Commission has not "consistently found that the 'substantial service' alternative meets the anti-warehousing goal"[5]. The Second

---

[3] *See* Second Recon Order at ¶ 31; Third Order on Reconsideration, FCC 95-429, released October 20, 1995 ("Third Recon Order") at ¶ 2.

[4] See Omnibus Reconciliation Act of 1993, Pub.L.No. 103-66 § 6002(a), 107 Stat. 312 (1993), 47 U.S.C. § 309(j)(4)(B).

[5] Opposition at 7.

R&O and Second NPRM made clear construction benchmarks were the preferred method of preventing warehousing. The use of the "substantial service" alternative was limited to circumstances where licensees provide niche service:

> We believe that this coverage requirement is reasonable and attainable for 900 MHz MTA licensees while also serving as a suitable deterrent to competitors who seek to obtain MTA licenses for anti-competitive warehousing rather than for service to the public. We also conclude that showing of "substantial service" is appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services.

Second R&O and Second NPRM at ¶ 41.

III. If PCI's Target Licenses Have Special Circumstances, It Can Seek a Waiver.

PCI's thinly veiled concern which prompted its last minute participation in this proceeding is its potential inability to meet the three-year/one-third construction benchmark in the Los Angeles MTA (if it is the successful bidder there). Because that MTA is one of only six nationwide that includes two designated filing areas ("DFAs"), it has two incumbent licensees. PCI's concern is that because two DFA licensees have had several years to build out their respective service areas within the MTA, there will not be sufficient unserved area for the new MTA licensee to meet the three-year/one-third construction benchmark without cooperating with the existing licensees.

PCI's argument is speculative. It has failed to demonstrate that incumbent licensees would prevent any MTA licensee from meeting a three-year/one-third buildout requirement. Further, even assuming the Los Angeles MTA is built out by incumbents, PCI should adjust its bidding strategy accordingly, which would eliminate its "problem." Notably, PCI is one of the two incumbents in the Los

Angeles MTA, so it (unlike other bidders) can apply its incumbent stations toward the construction benchmark.[6] Further, PCI is self-serving in claiming now that it is particularly interested in the Los Angeles MTA -- PCI filed its Form 175 application for "all markets", and can acquire licenses anywhere if the Los Angeles MTA licenses are burdened with incumbents and therefore less desirable.[7] The correct approach for any MTA auction licensee in those six affected areas is to seek a waiver and demonstrate both why it was unable to meet the three-year/one-third benchmark and why it desires a waiver (*i.e.*, a showing that it did not and will not engage in greenmail against the incumbents).

IV. Conclusion.

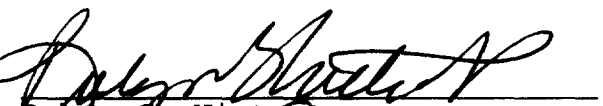
PCI's late entry into this proceeding apparently stems from the fact that it does not believe it will be able to meet the three-year/one-third construction benchmark. Its support of the Commission's arbitrarily released Second Erratum is strictly self-serving. The public interest is better served with strict construction benchmarks because that is the method by which the twin goals of rapid deployment and spectrum warehousing prevention can be met. The rule propagated in the Commission's Second Erratum advances neither of those goals. For the foregoing reasons, the Application for Review of CelSMeR and CHM should be granted.

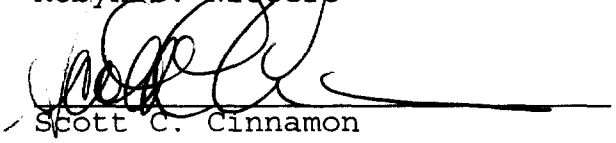
---

[6] Through a wholly-owned subsidiary, PCI holds the licenses for call signs WPCS836, WPCS838, WPCS840, WPCS845 and WPCS850 in this MTA.

[7] *See*, Public Notice, Report No. AUC-95-07, Auction No.7, released November 27, 1995 ("A&B Electronics, Inc.," Appendix, p.1 of 20.)

Respectfully submitted,
CelSMeR and CHM, Inc.

By: 
Robyn A. Nietert

By: 
Scott C. Cinnamon

Their Attorneys

Brown Nietert & Kaufman, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

January 11, 1996

SCC\CELSMER.REP

CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Reply to Opposition to Application for Review**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 11th day of January, 1996 to each of the following:

* Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

* Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

* Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, DC 20554

* Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554

* Ms. Michele C. Farquhar
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7002
Washington, DC 20554

* Ms. Rosalind K. Allen
Chief of Comm., Wireless Division
Federal Communications Commission
2025 M Street, N.W.
Room 7002
Washington, DC 20554

* Ms. Lisa Higginbotham
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, DC 20554

* Jonathan Wiener
Goldberg, Godles, Wiener
& Wright
1229 Nineteenth Street, N.W.
Washington, DC 20036

* Russell Fox
Gardner, Carton & Douglas
1301 K Street, N.W., East Tower
Washington, D.C. 20005

Melissa L. Clement

Melissa L. Clement

* - Via Hand Delivery

SCC\CELSMER.SER